



**The Comptroller General
of the United States**

Washington, D.C. 20548

Melody

Decision

Matter of: Hayes International Corporation

File: B-224567

Date: February 4, 1987

DIGEST

Offeror is no longer entitled to be considered for award under request for proposals where offeror is suspended from government contracting before best and final offers are due, and contracting agency does not make written finding under applicable regulation that compelling reason exists for continuing consideration of offeror's proposal.

DECISION

Hayes International Corporation protests the award of a contract to any other offeror under request for proposals (RFP) No. F34601-87-R-49000, issued by the Air Force for programmed depot maintenance of KC-135 aircraft. Hayes challenges the Air Force's reliance on Hayes' recent suspension from government contracting as the basis for the decision not to award a contract to Hayes under the current RFP. We deny the protest.

The RFP, issued on February 13, 1986, called for proposals to perform programmed depot maintenance, including repair and modifications, on the Air Force's KC-135 aircraft on a fixed-price basis for a 1-year base period, with four 1-year options. Section M-900 of the RFP provided that evaluation of proposals would be based on the following factors, in descending order of importance: (1) management/experience; (2) quality; (3) production/facilities; (4) safety; and (5) cost/price. The RFP also provided that award would be made to the offeror whose proposal was found to be the most advantageous to the government, price and other factors considered, and specifically reserved the right to make award at other than the lowest proposed price.

Proposals were received from three offerors, including Hayes and Boeing Military Airplane Company. Based on its initial evaluation, the Air Force's Source Selection Evaluation Group (SSEG) rated the Hayes proposal "green," or acceptable, in

037967

all four technical categories.^{1/} Discussions then were held with each offeror on June 18 and 19. On June 23, the Air Force advised the offerors that discussions had concluded and that best and final offers were due on July 21.

On July 2, the Air Force suspended Hayes from future contracting with any executive agency. As described in the report by the Air Force's Debarment and Suspension Board, the suspension was based on findings in a Navy investigation regarding unacceptable performance by Hayes under Navy aircraft maintenance contracts, following the fatal crash of a Navy aircraft worked on by Hayes; concerns regarding the quality of Hayes' performance and other apparent irregularities, such as inadequate billing practices, raised during a federal task force investigation of Hayes begun in 1984; and a pending grand jury investigation of Hayes' performance which stemmed from the 1984 task force investigation. In connection with the criminal investigation, on July 25, Hayes entered a guilty plea to 38 counts of felony fraud based on improper alteration of time cards.

Despite its suspension, Hayes submitted a best and final offer under the RFP by the July 21 due date. Hayes' proposal then was evaluated by the Air Force along with the other two best and final offers. Hayes' rating remained the same, green/acceptable in all four technical categories.^{2/}

The evaluation documents prepared by the SSEG included an overall assessment of each offeror's past performance; with regard to Hayes, the documents included a brief description of the suspension and guilty plea. Hayes' price for the base year (ca. \$40 million) was approximately \$38 million below Boeing's price (ca. \$78 million); over the life of the contract, including all four option years, Hayes' total price was approximately \$28 million below Boeing's price.

In a briefing to the Source Selection Authority (SSA) on August 5, the SSEG provided an overview of its evaluation of the offerors' technical and price proposals, including a "risk assessment" of each offeror. Hayes was rated a low risk when considered solely on the basis of the information in its proposal; Hayes was rated a medium risk, however, when its suspension from government contracting and guilty plea were taken into account. Boeing was rated as a low risk.

^{1/} The Air Force used the following color-coded scheme for proposal evaluation: blue, exceptional; green, acceptable; yellow, marginal; red, unacceptable.

^{2/} Boeing's rating was equivalent to Hayes' rating. The evaluation of the third offeror, whose rating was lower than the Hayes or Boeing ratings, is not at issue in the protest.

The SSEG's briefing concluded with a recommendation that award be made to Boeing.

According to the Air Force, on September 4 the SSA received a copy of a proposed settlement agreement between the Air Force and Hayes detailing remedial measures to be taken by Hayes in exchange for lifting the suspension. On September 6, the SSA asked for a new risk assessment of the Hayes proposal in light of the proposed settlement agreement. On September 10, the SSA was briefed on the new risk assessment.^{3/} The briefing concluded, and the SSA later agreed, that the remedial actions proposed by Hayes in the settlement agreement reflected inadequacies in Hayes' past performance which adversely affected the rating of the Hayes proposal under the RFP. Specifically, the new risk assessment found that Hayes' rating should be lowered from green/acceptable to yellow/marginal in the two most important categories, management/experience and quality. As a result, Hayes' technical rating fell below Boeing's rating.

The Air Force suspension of Hayes was lifted on September 29; that same day, the SSA directed the contracting officer to make award to Boeing. The contract was awarded to Boeing on October 2. On October 15, the Air Force authorized Boeing to proceed with contract performance notwithstanding the protest based on its finding under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2)(A)(i) (Supp. III 1985), that performance of the contract would be in the best interests of the United States.

Hayes argues that (1) it was inherently unreasonable for the Air Force to downgrade its offer based on the proposed settlement agreement; and (2) at a minimum, it was improper for the Air Force not to raise the suspension issue in discussions with Hayes. We need not reach these issues, however, since we find that once the suspension took effect, Hayes was no longer entitled to be considered for award under the RFP.

As discussed above, the Air Force suspended Hayes from government contracting on July 2, after discussions had been held but before best and final offers were due under the RFP. With regard to consideration of proposals from suspended

^{3/} The Air Force does not specify whether the official who later prepared the memo detailing the September 10 briefing was a member of the SSEG. In a memo explaining the award decision, however, the SSA states that the briefing represented the SSEG's views.

contractors, the Department of Defense FAR Supplement, 48 C.F.R. § 209.405(a)(1) (1986), provides in relevant part:

"Proposals, quotations or offers received from any [contractor on the consolidated list of debarred or suspended contractors] shall not be evaluated for award or included in the competitive range, and discussions shall not be conducted with such offeror, unless the Secretary concerned or his authorized representative determines in writing that there is a compelling reason to make an exception."

In light of this provision, the Air Force states that the SSA erred in continuing to consider the Hayes proposal after the July 2 suspension and instead should have eliminated it from the competition. We agree. The DOD FAR Supplement clearly provides that once suspended, a contractor is no longer eligible for consideration under pending procurements in the absence of the appropriate written finding by the contracting agency. Here, since the Air Force made no such finding, the Hayes proposal should have been eliminated from further consideration under the RFP once the suspension was imposed on July 2. In addition, after Hayes became ineligible for award on July 2, there was no requirement that the Air Force reinstate the Hayes proposal in the competition even though the suspension later was lifted 2 days before award was made. See Tracor Applied Sciences, Inc., B-221230.2, et al., Feb. 24, 1986, 86-1 CPD ¶ 189. Since we find that Hayes should have been eliminated from the competition once the suspension took effect, we need not decide whether the Air Force acted properly in relying on the suspension and related events in evaluating the Hayes proposal.

Hayes has requested that it be allowed to recover the costs of filing and pursuing the protest and its proposal preparation costs. Since we find the protest to be without merit, we deny the request for costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d), (e) (1986).

The protest is denied.

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